SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 346

HEWITT R. K. PARSONS

versus

GULF & SOUTH AMERICAN STEAMSHIP COMPANY, INC.

Petition for Writ of Certiorari to Review The Decision of the Supreme Court of Louisiana

H. ALVA BRUMFIELD
EVANGELINE M. VAVRICK
328 Chartres Street
New Orleans, Louisiana 70130
Attorneys for Petitioner

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IN THE
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Petition for Writ of Certiorari to Review The Decision of the Supreme Court of Louisiana

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Hewitt R. K. Parsons, the petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered April 14, 1967 denying application for writs of review.

CITATIONS TO OPINIONS BELOW

The opinion of the Judge of the Civil District Court, Parish of Orleans, printed in Appendix G was unreported. The opinion of the Fourth Circuit Court of Appeal, State of Louisiana, printed in Appendix D hereto, is reported at *194 So. 2d 456*. The opinion of the same Fourth Circuit Court of Appeal, denying a rehearing, printed in Appendix C hereto, is not reported. The opinion of the Supreme Court of Louisiana denying a

writ of certiorari printed in Appendix B hereto, is reported at *197 So. 2d 80*.

JURISDICTION

The judgment of the Supreme Court of Louisiana denying a writ of certiorari, or writ of review, to the Court of Appeal, Fourth Circuit of the State of Louisiana was entered on April 14, 1967 and is printed in Appendix B hereto. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

(1) Is the 7th Amendment's mandate of Trial by Jury applicable to the States through the Due Process Clause of the 14th Amendment?

(2) Is de novo review of fact in Louisiana at the appellate level contrary to the 7th Amendment's mandate that review cannot be otherwise than according to the rules of common law?

(3) Is Article 7, Section 29, of the Louisiana State Constitution of 1921, as amended, at variance with and violative of the United States Constitution and more particularly the 7th Amendment and the Due Process Clause of the 14th Amendment.

(4) Is trial by jury in a civil matter a fundamental right implicit in the concept of ordered liberty and secured from state abridgment through the 14th Amendment?

(5) Has "Due Process" been accorded a litigant who prevailed in a fair civil trial before 12 reasonable men, in which there were no errors of law, if the Court of Appeal is free to reverse and render judgment on questions of fact alone?

(6) The applicability of Title 46, Section 688 of the United States Code, wherein the petitioner has been guaranteed a trial by jury pursuant to a federal statute.

STATUTES INVOLVED

1. Amendment VII—United States Constitution (Appendix A)

2. Amendment XIV—United States Constitution (Appendix A)

3. Article 7, Section 29-Louisiana State Constitution of 1921 as amended. (Appendix A)

4. Title 46, Section 688—The Jones Act—United States Code. (Appendix A)

STATEMENT OF THE CASE

Hewitt R. K. Parsons, petitioner, a merchant mariner, 64 years of age, with more than fifty years of sailing experience (TR-2) and an impeccable record, was discharged from the S/S Gulf Shipper on a smuggling charge, which charge was communicated to the Lou-

isiana Department of Employment Securities, (R-12) and that agency denied him benefits.

On June 7, 1961, while the Gulf Shipper was docked in the port of Antofagasto, Chile, the vessel was searched for contraband by Chilian Customs Officials (TR.-6) and large quantities of dutiable articles seized, in fact, two trucks, each of which was loaded twice, were needed to haul the contraband away. (TR. -42)

The chief steward, Mach Boyd, and the galley utility, William Lee were "HELD RESPONSIBLE BY CUSTOMS ANTOFAGASTO FOR CONTRABAND SOLELY IN STEWARD STORE ROOM SPACES." (Defendant's Exhibit #1 - Captain Lee's Deposition - Exhibit-Captain Lee #1) and the vessel fined $5,000.00 (TR.-33)

The ship proceeded from Antofagasto to the next port, Valparaiso, where another investigation was held. (Def. Exh. #1, P-26) In neither of these Chilean ports was Hewitt Parsons implicated, accused, tried or convicted (Def. Exh. #1, P-27) by Chilean customs officials nor was he implicated by ship's officials.

The voyage in question began on May 16, 1961, and terminated on July 21, 1961, in the port of New Orleans. Some time during the first leg of the voyage a souvenir list was prepared, on which regulated items were declared by the crew members themselves pursuant to instructions received from the Purser and via the bulletin board. The individual crew declarations were

then compiled on a master list for Custom purposes (Def. Exh. #1, p. 14-16)

On July 10, 1961, some thirty-three days after the seizure and after having entered approximately 18 ports (Def. Exh. #1, p. 18), on both the southbound and the northbound voyage along the coast of South America, the captain allegedly conducted a search of the vessel in his personal crackdown on contraband. (Def. Exh. #1, p. 20)

Petitioner had declared to the Purser at the outset of the voyage on his individual declaration, that he had in his possession: one record player, two radios, three pair of gloves, two shirts, six undershirts, six chocolates, five boxes of gum and seven cartons of cigarettes. (Def. Exh. #1, Lee #1). On July 21, 1961 as the ship proceeded up the Mississippi River to the port of New Orleans, Petitioner was dismissed on a smuggling charge, (Plaintiff Exhibit #2) the first knowledge to him of his implication. It was the captain personally, who had ordered the charge placed on Parsons' record, because he concluded that since he did not, at the termination of the voyage find two radios, six chocolates, five boxes of gum and seven cartons of cigarettes, which were in Parsons' possession some two months earlier at the commencement of the voyage, that logically, the articles must have been landed in Valparaiso where they were dutiable. (Def. Exh. #1-Lee #1)

However, the search of the vessel wherein the captain allegedly discovered the articles missing was

proven to be a figment of his imagination, as both of his ranking officers with whom he allegedly conferred, denied having any knowledge of Parsons involvement or of having participated in the search.

Parsons filed a suit in the Civil District Court for the Parish of Orleans against Gulf and South American Steamship Company for defamation of character. (R-5) The defendant judicially admitted the communication (R-12) and therefore the burden of proof shifted to the defendant to prove the truth of such accusations. The *credibility* of the witnesses was thereafter of necessity, the salient consideration before the trier of fact.

The matter was tried to a jury of twelve men who rendered a unanimous verdict for the plaintiff and awarded him $10,000.00 in damages. (R-21) (Appendix H)

The Judge of Division D of the Civil District Court for the Parish of Orleans, Judge Sanford Levy, entered his judgment for the plaintiff in consideration of the law, the evidence and the verdict of the jury. (R-22) (Appendix G)

Motions by the defendant for a judgment notwithstanding the verdict and for a remittitur were denied and the defendant then brought a contradictory motion for a new trial which was also denied by the District Court Judge. (R-24-25) (Appendix E & F)

Defendant appealed on the law and the facts and

the 4th Circuit Court of Appeal substituted its judgment for that of the jury and District Court. The Court reversed the District Court on questions of fact thereby rendering the legal questions moot.

In the appellate opinion, there was no reference whatsoever to errors of law, and indeed there were none. The appellate Court simply disagreed with the findings of fact of the jury and disregarded its findings without finding, that the jury was composed of unreasonable men, or that the jury was prejudiced or that the findings of fact of the jury shocked the conscience of the Court. The Appellate Court found its own facts and reversed the jury, rendered judgment and declared the findings of the jury to be manifestly erroneous in what was a de novo trial minus witnesses and de meanor evidence.

Petitioner filed an application for rehearing (Appendix C) which was denied on February 13, 1967. Also an application for writs to the State Supreme Court was filed which was denied on April 14, 1967. (Appendix B)

REASONS FOR GRANTING THE WRIT

I. The right to a trial by jury in a civil case is not just a right guaranteed to litigants in the Federal Courts; it is a right guaranteed to litigants in the state courts as well. Mr. Justice Harlan in *Chicago Burlington and Quincy Railroad Company v. Chicago,* 166 U. S. 226 (1896) in questioning the authority of the Supreme

Court of Illinois under the constitution and laws of that state to re-examine facts stated:

> "It is clear that the last clause of the Seventh Amendment is not restricted in its application to the suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court brought here by writ of error from the highest court of the state. *One of the objections made to the acceptance of the Constitution as it came from the convention of 1787, was that it did not, in express words, preserve the rights of a trial by jury and that under it facts tried by a jury could be re-examined by the courts of the United States otherwise than according to the rules at common law.* The Seventh Amendment was intended to meet these objections and to deprive the courts of the United States of any such authority. It could not have been intended thus to restrict the power of the courts of the United States to re-examine facts tried by juries in the courts of the union AND LEAVE IT OPEN FOR THOSE COURTS TO RE-EXAMINE, IN DISREGARD OF THE RULES OF THE COMMON LAW, FACTS TRIED BY JURIES EMPANELED IN THE STATE COURTS IN CASES WHICH BY REASONS OF QUESTIONS INVOLVED IN THEM COULD BE BROUGHT UNDER THE COGNIZANCE OF THE COURTS OF THE UNITED STATES."

Constitutionally and historically all citizens of the United States are accorded a right to trial by jury including citizens of the State of Louisiana. The language of the 7th Amendment is clear, persuasive and convincing:

> "In suit at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury, shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Heretofore the Supreme Court has held this amendment inapplicable to the states, however, in recent monumental decisions this Court has overruled, in a searching examination of the Bill of Rights overruled, prior decisions holding the 1st, 4th, 5th, 6th and 8th Amendments inapplicable to the states through the 14th Amendment. The Court, in its reconsideration and reversal, has pondered zealously and arduously the privileges and immunities guaranteed American citizens and the inalienable rights basic to our ordered existence.

In *Gittau Vs. N.Y., 268 U.S. 652,* and since that decision this Court has consistently held the 1st Amendment guarantees applicable to the States through the 14th Amendment.

In 1963 in *School District of Abington Tp., Pa., V.*

Schempp Md & Pa. 83 S. Ct. 1560, 374 U.S. 203, this court held that the mandate against making laws respecting the establishment of a religion or prohibiting the free exercise thereof is applicable to the States through the 14th Amendment.

In *Engel V. Vitale 82 S. Ct. 1261, 370 U.S. 421 (1962)* this Court stated that both the Establishment of Religion Clause and the Free Exercise Clause of the 1st Amendment are operative against the States by virtue of the 14th Amendment.

In *Edwards V. South Carolina 83 S. Ct. 680, 370 U.S. 229 (1963)* this Court stated that the freedoms of the 1st Amendment are protected from invasion by the States through the 14th Amendment.

This Court in *Elfbrundt V. Russell 83 S. Ct. 328, 371 U.S. 415 in 1966* held that freedom of association is also applicable to the States through the 14th Amendment.

During the past decade the Supreme Court has reexamined, reconsidered and reweighed other provisions of the Bill of Rights and the applicability of the rights guaranteed in the first Eight Amendments to the citizens of the United States through the 14th Amendment from abridgement by the States.

In all respects the personal inalienable rights, privileges, immunities and guarantees to American Citizens through the Bill of Rights have been proclaimed by this Supreme Court to be applicable to the States through the 14th Amendment, except those guarantees of the 7th Amendment.

Mapp V. Ohio 81 S. Ct. 1684, 367 U.S. 643 in 1961 saw this Court reverse *Stifanelli V. Minard* and hold the 4th Amendment's right to privacy enforceable against the States through the Due Process Clause of the 14th Amendment.

This Court, in reversing *Adamson V. California 67 S. Ct. 1672 332 U.S. 46 (1947)* in *Malloy V. Hogan 84 S. Ct. 1489, 378 U.S. (1964)* held the exception from compulsory self-incrimination to be protected from abridgement by the States through the 14th Amendment.

Likewise, the 6th Amendment has been held applicable by this court to trials in State Courts through the 14th Amendment in the *Gideon Vs. Wainwright decision 83 S. Ct. 792, 372 U.S. 335 (1963)* and also in *Pointer V. Texas 85 S. Ct. 1065, 380 U.S. 400 (1965).*

In *Gideon* this Court held that where a provision of the Bill of Rights of the Federal Constitution is *fundamental and essential to a fair trial,* it is made obligatory on the States by the 14th Amendment and in *Pointer V. Texas* this Court held that the 6th Amendment's mandate of the right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the states through the 14th Amendment.

The 8th Amendment's prohibition against cruel and unusual punishment was held inapplicable to the States until 1962 when this Court in reversing *Collins*

Vs. Johnson 237 U.S. 502 in *Robinson V. California 82 S. Ct. 1417, 370 U.S. 660;* held the 8th Amendment's prohibition applicable to the States through the 14th Amendment.

There is no jurisprudence on the question of the applicability of the Seventh Amendment to State Courts by virtue of the passage of the Fourteenth Amendment.

Only one post-fourteenth amendment case, *Edwards v Elliot,* 88 U.S. 487, 21 Wall. 532 (1874) considered the applicability of the Seventh amendment to the States, and then only in a cursory fashion and dismissed the contention with the passing remark, "That it does not apply to trials in the State Courts."

The pertinent part of the Edwards decision is as follows:

> "Two answers may be made to that objection, either of which is decisive: That it does not apply to trials in the State Courts . . . *Barron v Baltimore, Twitchell v Commissioner,* 7 Pet. 551; *Livingston v Moore,* 8L. Ed. 751, (1823); *Fox v Ohio,* 5 How. 434, (1847); *Smith v Maryland* 15 L. Ed. 270, (1855);

The foregoing opinion contains not one word with respect to the quality or character of the right to a trial by jury and all of the authorities cited in support of the contention that the Seventh Amendment is not

applicable to the States are all pre-fourteenth Amendment decisions.

Yet, it was the Edwards case cited one year later in *Walker v Sauvinet,* 92 U. S. 90, 23 L. Ed 678, (1876), to support the holding that the Seventh Amendment relates only to trials in the Courts of the United States.

There is by virtue of the passage of the Fourteenth Amendment, no present authority for the "passing remark" found in the *Edwards v Elliot* case. It does not purport to discuss whether or not trial by jury in Civil cases is a fundamental right safe guarded by the Seventh Amendment. However, it is this case alone, which seems to be the authority from which Chief Justice Waite drew his conclusion in *Walker v Sauvinet,* 92 U. S. 90, 23 L. Ed 678 (1876) that:

> "The States, so far as this Amendment is concerned, are left to regulate trials in their own Courts in their own way. A trial by jury in suits at common law pending in the State Courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge." 23 L. Ed. at page 679.

The Edwards case, the authorities supporting it and *Walker v Sauvinet,* are all pre-Gidion and do not pass upon the question of whether or not trial by jury is a fundamental safeguard of liberty immune from state abridgment by the Fourteenth Amendment.

This Court in Gideon 83 S. Ct. 792 states:

> "Those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process clause of the Fourteenth Amendment."

At 795 of the Gideon decision the Supreme Court stated:

> "Explicitly recognized to be of this 'fundamental nature and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedom of speech, press, religion, assembly, association and petition for redress of grievances.' For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment's command that private property shall not be taken for public use without just compensation, the Fourth Amendment's prohibition of unreasonable searches and seizures and the Eight's ban on cruel and unusual punishment."

The issue here is whether or not the right guaranteed by the Seventh Amendment of trial by jury is such a right as defined in Gideon. This Court in the Gideon case quoted from *Grosjean v American Press Co.*, 297 U. S. 233, 243-244, 56 S. Ct. 444, 446, 80 L. Ed. 660 (1936) as follows:

> "We conclude that certain fundamental rights, safeguarded by the *first eight amendments* against federal action, were also safeguarded against state action, by the due process clause of the Fourteenth Amendment."

Further in Gideon this Court stated:

> "In returning to these old precedents, sounder we believe that the new, we but restore constitutional principles established to achieve a fair system of justice."

It is submitted that if Gideon means what it says and that if the fundamental rights safeguarded by the first eight amendments against federal action are safeguarded against state action by the Fourteenth Amendment then Gideon impliedly overruled *Walker v. Sauvinet,* and it is now the time to re-examine the aforestated 7th Amendment pre-Gideon rulings in light of Gideon and the renaissance of emphasis on the "basic rights that are enshrined in our Constitution." Such re-examination is exactly what the Supreme Court has done in the same general area of the law.

In Malloy v. Hogan, 84 S. Ct. 1489, this Court stated:

> "The Court has not hesitated to re-examine past decisions, according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was

contemplated by its Framers when they added the amendment to our Constitutional scheme."

For the foregoing reasons and in view of the recent decisions of this Honorable Court, it is submitted that petitioner's position is not contrary to the views of this Court and it is submitted that those views support the petitioner's major premise that the Seventh Amendment applies to State Court Judicial review of facts in civil matters by virtue of the Fourteenth Amendment.

II. Louisiana's Review of Facts is contrary to the mandate of the 7th Amendment that no fact shall be re-examined other than according to the rules of common law.

Mr. Justice Gray in *Capital Traction Company v Hof*, 174 U. S. 1, 6 (1898) in discussing the scope and effect of the Seventh Amendment of the Constitution referred to the circumstances preceding and attending the adoption of that Amendment in order to ascertain its true meaning and its application.

He stated that the Seventh Amendment in declaring that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law," had in view the rules of the common law of England and not the rules of that law as modified by local statute or usage in any of the states. The only mode known to the common law to re-examine facts was the granting of a

new trial by the court where the issue was tried or to which the record was properly returnable; or the award of a *venire facias de nova* by an appellate court for some *error of law* which intervened in the proceedings. *Parsons v. Bedford*, 7 L. Ed 432, (1830).

In the historical context of trial by jury, the jury verdict *is conclusive* if the evidence *though disputed* constitutes probative facts sufficient to support their findings. *Gallick v. Baltimore & Ohio Railroad Company*, 372 U. S. 108, 115, 83 S. Ct. 659 (1962); *Basham v. Pennsylvania Railroad Company*, 372 U. S. 699, 83 S. Ct. 965 (1963); *Rogers v. Missouri Pacific Railroad Company*, 352 U. S. 500, 77 S. Ct. 443 (1957); *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946).

If a verdict therefore has been rendered on a material issue of fact, it cannot thereafter be overturned.

The Supreme Court of the United States stated in *Tenant v. Peoria and P. U. R. Co.*, 321 U. S. 35, 64 S. Ct. 409 (1943) the limitation on appellate review in these words:

> "The courts are not free to re-weigh the evidence and *set aside the jury verdict merely because the jury could have drawn different conclusions or because judges feel that other results are more reasonable.*

It is an undue invasion of the jury's function for an appellate court to reweigh the conflicting evidence and judge the credibility of the witnesses. *Lavender*

Administration v. Kurn, et al Trustees, 327 U. S. 645, 66 S. Ct. 740 (1945).

Louisiana District Courts have adequate safeguards against "shocking findings of fact", "shocking jury verdicts" or "improprieties of jurors".

Article 1813 of the Louisiana Code of Civil Procedure provides for the granting of a new trial, if the trial court is of the opinion that the verdict is excessive or inadequate and the same article further provides for an additur or remittitur in lieu of a new trial.

Article 1814 of the Louisiana Code of Civil Procedure provides for the granting of a new trial for impropriety on the part of jurors and new trial procedures are also set forth in Articles 1971 and 1979.

The supervision, control and direction of trial conduct and procedure and the correction of abuse is properly provided in Louisiana procedure at the trial level and should therefore be properly relegated to the trial judge in the District Court. It is he, who observes the trial - litigants, attorneys, witnesses, jurors; it is he who charges the jury and it is he, who has the superior opportunity to properly evaluate the findings in light of the weight and sufficiency of the evidence and the conduct of all concerned. His judgment then, should be accorded some significance and insulation from abuse at the appellate level.

In Louisiana, appellate review of facts, renders the jury's findings as well as the judge's sanction a mock-

ery, by reason of the Court of Appeal's capacity to review, reverse and render a judgment on questions of fact alone from the cold transcript.

Although a "right to trial by jury" exists, it is not guaranteed or protected if elected by a litigant. A day in court, before a jury is just a dry run - a dress rehearsal. It matters not how fair or hard fought a trial; nor how strictly the rules of evidence may have been adhered to, nor show completely devoid of errors of law the record might be, if the Court of Appeal thinks otherwise, on questions of fact alone it can reverse and render.

A litigant, who exercises his right to a trial by jury, if successful, must for all practical purposes retry his case anew, for there is sure to be an appeal. His case is then reheard by a panel of three judges, all within the space of half hour, and in the greater majority of cases - far less time than was spent by the jury in deliberating.

It is conceivable and understandable, why there are so many reversals on fact alone. That the judges of the Appellate Courts arrived at different conclusions should be expected, as they must decide the issues on half the record, without one scintilla of demeanor evidence, which after all is what forms the basis for credibility of witnesses.

Appellate judges never see the litigants, witnesses, or jurors yet have such latitude in deciding the credi-

bility of witnesses, and inability of jurors to grasp the issues.

There are no safeguards in Louisiana Procedure against errors at the appellate level; rarely if ever is a rehearing granted and rarely if ever are writs granted by the State Supreme Court on questions of fact alone.

These facts speak for themselves and belie any proposition that Appellate review of facts as it exists in Louisiana is constitutional.

The right to present demeanor evidence is also a constitutional right secured to citizens by the Fifth through the Fourteenth Amendment, *S. Buchsbaum and Company v Federal Trade Commission* 153 F 2d 85.

In the Louisiana appellate procedure which results in retrial not only is the federally secured right of the Seventh Amendment violated but also that of the Fifth.

III. Article 7 Section 29, of the Louisiana Constitution which provides for appellate review of facts found by a jury in a civil matter does not meet the requirement of "due process."

The term "due process of law" includes and is coterminus with those principles of justice so rooted in the traditions and conscience of our people as to be

ranked as fundamental, and the Court has so stated and held.

In the United States the courts have consistently upheld the power of the appellate courts as well as the trial courts to order new trials on the ground that the verdict has been against the evidence or that the damages have been excessive or inadequate. *Southern Ry. Co. v Bennett,* 233 U. S. 80, 83, 67 S. Ct. 403 (1913)

In Louisiana the appellate court re-examination of the facts as well as the law in civil matters results in the trial of the case de novo contrary to the common law tradition; and the rendering of judgments on appeal based on its re-evaluation of the facts rather than granting a new trial and is this practice that effects and deprives the litigant of a right to trial by jury and to due process in civil cases.

It is petitioner's contention that the Louisiana appellate court's re-examination of facts and the substitution of its judgment on a question of fact is an unconstitutional violation of the Fourteenth Amendment due process clause and the Seventh Amendment's mandate of re-examination only according to the rules of common law.

This Court in *Synder v. Mass.* 291 U. S. 97, 105 (1933) stated that the due process clause of the Fourteenth Amendment protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." In determining which rights are fundamental, the inquiry is whether the

right involved" is of such character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions ***." *Powell v. Alabama* 287 U. S. 215, (1932).

It is petitioner's contention that the right to a trial by jury is a right which is rooted in the conscience and traditions of American people, and is justly dear to them. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy. The right to such a trial is incorporated into and secured in every state constitution and is a right "implicit in our concept of ordered liberty." *Plako v. Conn.*, 302 U. S. 319, 325 (1942).

It is a right which truly lies at the base of all our civil and political institutions and in a civil case is therefore a right which falls within the penumbra of specific guarantees of the Bill of Rights.

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment to the right of a jury trial should be scrutinized with utmost care." *Dimick V. Schiedt, 293 U.S. 473, 79 L. Ed 603, 600 (1934).*

Whether or not a trial by jury in civil matters is a right so fundamental to ordered liberty as to have been imposed upon the States by adoption of the 14th

Amendment can best be answered by *Parsons V. Bedford, et al, 7 L. Ed 432 (1820).*

> "The *trial by jury* is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State Constitution in the Union. One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a *fundamental guarantee of the rights and liberties of the people.*" 7 L. Ed at Page 443 (Emphasis added)

Three years later it was said again:

> "trial by jury . . . . is justly regarded in every State of the Union, as *among the most inestimable privileges of a freeman.*" *Livingston V. Moore* 8 L. Ed 751, 757 (1823.) (Emphasis added)

IV. The Jones Act permits a seaman suffering personal injury in the course of his employment as a re-

sult of his employer's negligence to maintain an action for damages against his employer with a right to trial by jury.

Had this suit been filed in the Federal Court, there is no doubt that petitioner would have been entitled to a real trial by jury.

There is no question as to the employer's negligence in the instant matter as to the manner in which the Captain and Mates allegedly conducted their search and arbitrarily and without confrontation or hearing accused seamen of smuggling and subsequently dismissed them and then communicated the charge to the Department of Employment Securities.

That mental anguish, pain and suffering such as were experienced by petitioner are real injuries is also not disputable.

Were this an appeal in admiralty, there could not have been a trial de novo, as the issue of Appellate review in admiralty matters was laid to rest by the Supreme Court in *McAllister v United States* 348 U. S. 19, 99 L. Ed. 13, 75 S. Ct. (1954).

By exercising his right in the State Court petitioner's right to a real trial by jury pursuant to the Seventh Amendment and the Jones Act have both been violated.

CONCLUSION

There is no basis in history, law or significant jurisprudence of the United States justifying the conclusion that the right to an efficacious trial by jury in civil cases is any less worthy of imposition on the States than any of the other privileges and immunities granted to all citizens of this country by the first ten Constitutional Amendments.

The instant case is most assuredly a violation of the Bill of Rights of the Constitution of the United States. When Louisiana permitted petitioner to exercise his right to trial by jury, it became incumbent upon the State to provide a true and genuine trial by jury in accordance with the provisions of the Seventh Amendment, to do otherwise mocked justice and the efficacious time honored institution called the jury.

The Supreme Court has, we submit, in its re-examination of the Bill of Rights in its Constitutional and historical context and in light of the Fourteenth Amendment enunciated the following principles which support petitioner's major premise:

(1) That the Constitution is the Supreme law of the land and laws passed pursuant to it are also the supreme law of the land, binding alike upon states anything in the constitution or laws of any state to the contrary notwithstanding.

(2) That the fundamental rights safeguarded by the first eight amendments against federal action are also safeguarded against state action.

(3) That the obligation to guard and enforce every right secured by the Federal Constitution rests on State Courts equally.

(4) That where provisions of the Bill of Rights of the Federal Constitution are fundamental and essential to a fair trial, then they are made obligatory on the States through the Fourteenth Amendment.

(5) That a right to trial by jury in a *criminal* matter guarantees that there will be a fair jury trial and that a *fair trial in a fair tribunal is a basic requirement of due process* under the Fourteenth Amendment of the Constitution.

(6) That where rights secured by the Constitution of the United States are involved, there can be no rule making or legislation which would abrogate them by the states.

(7) That what a jury finds is final, as long as there has been a fair trial.

(8) That the requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the funda-

> mental integrity of all that is embraced in the Constitutional concept of trial by jury.

Mooney v Holohan, 55 S. Ct. 340, 294 U.S. 103 (1935); *Grosjean v American,* 56 S. Ct. 444, 297 U. S. 233 (1936); *Smith v O'Grady,* 61 S. Ct. 572, 312 U. S. 329 (1941); *Testa v Katt,* 67 S. Ct. 810, 330 U. S. 386 (1947); *Mapp v Ohio,* 81 S. Ct. 1684, 367 U. S. 643 (1961); *Robinson v State of California,* 82 S. Ct. 1417, 370 U. S. 660 (1962); *Gideon v Wainwright,* 83 S. Ct. 792, 372 U. S. 335, March 1963; *Basham v Pennsylvania,* 83 S. Ct. 965, 372 U. S. 699 (1963); *Mercer v Theriot,* 84 S. Ct. 1157, 377 U. S. 152, (1964); *Turner v State of Louisiana,* 85 S. Ct. 546 379 U. S. 466 (1965); *Pointer v State of Texas,* 85 S. Ct. 1065, 380 U. S. 400 (1965); *Estes v State of Texas,* 85 S. Ct. 1628, 381 U. S. 532, (1965); *Miranda v State of Arizona,* 86 S. Ct. 1602 (1966).

Mr. Justice Goldberg in his concurring opinion in the *Pointer* case made his belief clear as has Mr. Justice Black, that the guarantees of the *first eight amendments* of the constitution are "incorporated" through the Due Process Clause of the Fourteenth Amendment.

It is submitted that there is no jurisprudence concerning the quality or nature of the right to trial by jury. That the Supreme Court over 91 years ago in *Walker v Sauvinet* relied on pre-Fourteenth Amendment jurisprudence as the basis for its opinion, that the Seventh Amendment was not applicable to the States. It is therefore respectfully submitted that in view of

this Court's recent concern and pronouncements in this area of the law and in absence of a pronouncement by this Court on the issue before it, i.e., the quality and nature of the right to trial by jury, in its full historical and Constitutional context that writs should be granted.

Respectfully submitted,

LAW OFFICES
H. ALVA BRUMFIELD
328 Chartres Street
New Orleans, La. 70130

By /s/ H. Alva Brumfield
H. Alva Brumfield

and

By /s/ Evangeline Molero Vavrick
Evangeline Molero Vavrick

PROOF OF SERVICE

I, H. Alva Brumfield, attorney for the Petitioner, Hewitt R. K. Parsons, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day, I served copies of the foregoing Petition for Writ of Certiorari on Mr. Edward Merritt, of the law offices of Terriberry, Rault, Carroll, Yancey & Farrell, counsel for defendant by mailing copies thereof, postage prepaid, addressed to his office at 2128 International Trade Mart Building, 2 Canal Street, New Orleans, Louisiana 70130

Dated this 7 day of July, 1967

/s/ H. Alva Brumfield

H. Alva Brumfield.

APPENDIX A

UNITED STATES CONSTITUTION AMENDMENT VII-CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

UNITED STATES CONSTITUTION AMENDMENT 14 SECTION 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LOUISIANA STATE CONSTITUTION OF 1921 AS AMENDED ARTICLE 7 SECTION 29

The Courts of Appeal, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases,

civil and probate, of which the Civil District Court for the Parish of Orleans, or the District Courts throughout the State, have exclusive original jurisdiction, regardless of the amount involved, or concurrent jurisdiction exceeding one hundred dollars, exclusive of interest, and of which the Supreme Court is not given jurisdiction, except as otherwise provided in this Constitution, and all appeals shall be both upon the law and the facts.

UNITED STATES
CODE
TITLE 46 SECTION 688

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

APPENDIX B

SUPREME COURT OF LOUISIANA
New Orleans, 70112
April 14, 1967

Hewitt R. K. Parsons

v. No. 48,631

Gulf & South American
Steamship Company, Inc.

In re: Hewitt R. K. Parsons applying for certiorari, or writ of review to the Court of Appeal, Fourth Circuit, Parish of Orleans

---

Writ refused.

On the facts found by the Court of Appeal we find no error of law in the judgment complained of.

/s/ FWS
/s/ JBF
/s/ JBH
/s/ FWH
/s/ EHMcC
/s/ WBH
/s/ JWS

APPENDIX C

COURT OF APPEAL, FOURTH CIRCUIT
State of Louisiana

Clerk's Office, New Orleans, Feb. 13, 1967

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED PARSONS v. GULF & SOUTH AMERICAN STEAMSHIP CO., INC.
No. 2401

Very truly yours,
M. J. KEENAN, Clerk.

APPENDIX D

Hewitt R. K. Parsons	:	No. 2401
versus	:	Court of Appeal
Gulf & South American	:	Fourth Circuit
Steamship Company, Inc.	:	State of Louisiana

Appeal from The Civil District Court for the Parish of Orleans, Division "D", No. 402-724,

Honorable S. Sanford Levy, Judge

Jan. 9, 1967

Chris T. Barnette
Judge

(Court composed of Judges L. Julian Samuel, Luther E. Hall and Chris T. Barnette)

DONALD V. ORGAN
EVANGELINE MOLERO VAVRICK
for plaintiff-appellee.

TERRIBERRY, RAULT, CARROLL, YANCEY & FARRELL
BENJAMIN W. YANCEY
WILLIAM E. WRIGHT
G. EDWARD MERRITT
for defendant-appellant.

REVERSED.

This is an appeal from a judgment based on a jury verdict awarding plaintiff damages in the amount of $10,000 for libel.

The plaintiff Hewitt R. K. Parsons, an able-bodied seaman of many years experience, was employed by defendant Gulf & South American Steamship Co., Inc., for a voyage of the SS. "Gulf Shipper," one of defendant's vessels, beginning on May 16, 1961. The voyage in question included ports in the Republic of Chile. On June 7, 1961, while in the port of Antofagasta, Chile, there was a disturbance on board in which plaintiff was involved. The incident gave rise to charges against plaintiff which defendant included among reasons for discharging him when the vessel returned to the Port of New Orleans, July 24, 1961.

On July 23, as the vessel was entering the Port of New Orleans, Mr. Parsons was handed a written notice of dismissal which included the following:

> "REASONS FOR DISMISSAL: Antofagasta, Chile. While at Antofagasta, Chile on June 7, 1961 at 1930 hrs., Hewitt K. Parsons, A.B., apparently intoxicated in a violate [sic] mood kicked in and broke screen on starbard [sic] door to main deck passageway refusing to go to his quarters when ordered by Chief Officer, also threatening Second Mate with his fists when handcuffs were brandished to calm him down.

"Handling contrabrand [sic] contrary to government and the company regulations."

He was also given a copy of a separation notice, the original of which was mailed by the employer to the Administrator, Division of Employment Security, Baton Rouge, Louisiana, containing the following:

"REASON FOR SEPARATION. State fully and clearly.

"Off the SS GULF SHIPPER V-69/70 at New Orleans, La.; Dismissed Insolence to superior officers and deliberate damage to vessel property. Handling contraband which is contrary to government and to company regulations."

The separation notice was given on a printed form prepared by the Division of Employment Security and provided to employers for use in appropriate cases. It contained the following printed instructions:

"FILL OUT IN TRIPLICATE: Mail the Original copy to the Administrator, Division of Employment Security, Baton Rouge 4, Louisiana, within 72 hours after separation. Give the duplicate copy to the worker within 72 hours and retain the triplicate copy for your files."

"FAILURE TO SUBMIT THIS REPORT WITHIN THE SPECIFIED TIME LIMITS MAY FORFEIT YOUR RIGHT TO APPEAL.

IT MUST BE SUBMITTED WITHIN 72 HOURS AFTER THE WORKER'S SEPARATION."

The notice of separation was given by defendant in accordance with these instructions.

The plaintiff did not allege, and the record is devoid of any evidence, that defendant published or gave a copy of the "Reasons for Dismissal," which it handed to Parsons personally, to any person other than Parsons. The publication of which plaintiff complains and upon which his claim for recovery is based is limited to the "Separation Notice" given to the Division of Employment Security.

Plaintiff did allege in his petition, on information and belief, that the defendant communicated the information contained in the notice of separation "* * * to numerous other third parties engaged in various aspects of the shipping business ** * *" and "* * * committed wide circulation to its express claims * * *." There is no proof whatever in the record to support these allegations. The only evidence that the allegedly libelous statement of reasons for dismissal were ever communicated to any other person was the testimony of Parsons himself, who testified that he reported the matter to his union representative and requested that he take it up with the proper officer of the vessel. He assumed that the union representative did so, but he had no knowledge of the conversations between them. He never inquired further about it. Clearly any publication of the statement made by the plaintiff himself

is not actionable. It is essential that the publication be by the defendant. Gilliland v. Feibleman's, Inc., 161 La. 24, 108 So. 112 (1926); Prosser, The Law of Torts, § 94 (2d ed. 1955). Therefore, plaintiff's case must rest entirely on the "Separation Notice" mailed to the Division of Employment Security.

The shipping company's primary defense is the assertion that the statements given in the notice of termination were true. Secondarily, defendant contends that the statement communicated to the Division of Employment Security was privileged and was made in good faith without malice. In the alternative, defendant argues that the damages awarded are excessive and punitive.

When the vessel was docked at Antofagasta, the Chilean customs authorities came aboard and seized a large quantity of contraband articles for which the vessel was fined $5,000. Chief Steward Boyd and Galley Utility Lee were held responsible for contraband found in the steward's storeroom spaces. Plaintiff Parsons was not charged in connection with this incident.

Plaintiff and other seamen were ashore when the customs officers began their search and were summoned to return. When he came aboard there was general excitement, loud talk, and much commotion; and he admitted that he was involved, but only in a spirit of "horseplay." He admitted he kicked a screen door, but claimed that it was ony incidental to the "horseplay" and was done without malicious intent. He denied that the door was damaged.

During the commotion and door-kicking incident, Joseph V. Cady, Chief Officer at the time, ordered Mr. Parsons to go to his quarters, which he refused to do. After some argument, Michael A. Scully, Second Mate, was told by Cady to get the handcuffs. Upon returning with the handcuffs, Mr. Parsons is alleged to have made a menacing gesture with his fists. While it is obvious that Mr. Parsons was not happy over the prospect of being handcuffed and taken to his room, we think he probably put his hands out in a mood indicating his great displeasure, but not as if to menace or strike anyone. At this point he calmed down and went to his room with a fellow seaman. The handcuffs were not placed on him.

This, in brief, is the incident giving rise to the charge of "insolence to superior officers and deliberate damage to vessel property." On these two points Mr. Parsons testified as follows:

"Q Mr. Parsons, you have testified that in Antofagasta you and fellow crew members were skylarking and talking loud in the passageways, is that correct?

"A I did.

"Q And that you kicked the door on the vessel?

"A Yes.

"Q And that the chief mate came up and ordered you to your room and you did not go, is that correct?

"A Yes.

"Q And that he ordered you again and you did not go?

"A That's right.

"Q And he ordered you a third time and threatened you with hand cuffs and you did not go?

"A (The witness nods his head affirmatively.)

"BY THE COURT:

Answer the question, he can't hear you.

"A Yes, sir."

The alleged handling of contraband is based on the following factual situation. It is customary on voyages such as the one in question to require all seamen to make a declaration of items subject to customs regulations of the countries to be visited. The ship's officers make a search of the vessel before entering port and after departing to determine if the listed articles are still in possession of, or satisfactorily accounted for by, each seaman. A customs receipt for any article taken ashore is accepted as satisfactory proof that it was not entered unlawfully. This procedure was followed on the voyage in question, and Mr. Parsons declared possession of several articles prior to arrival in Valparaiso, Chile, among which were two transistor radios. The reason for this procedure is that the ship itself can be fined if contraband is found aboard or items are illegally landed.

By stipulation of counsel, it was agreed that the customs laws of the Republic of Chile are applicable

to all types of radios, including small transistor radios. Payment of duties on such articles are entered in the Fiscal Treasury through the Treasury Service of the Republic, and a voucher is made in quadruplicate and signed by the officer in charge. A properly certified copy is given to the party bringing in the article. The penalty for entering such articles without complying with these regulations is a fine or imprisonment.

After departing the port of Valparaiso, a search of the vessel revealed that Mr. Parsons did not have in his possession either of the two radios. Since he could produce no customs receipt, it was concluded that they had been unlawfully entered at Valparaiso. Parsons admitted one of them was taken ashore and left in Valparaiso without the payment of duty. He testified as follows:

"Q I mean, would you explain for the Court and the jury what happened to both of these radios?

"A Yes, ma'am. I bought two, small radios, a 6-transistor and a small radio which is about — was about that size (indicating). I took the little radio to a little, 11-year-old girl, my chauffeur's little girl, at least the chauffeur we use all the time.

"I took that ashore and I presented it at the Customs House. I said, I told him what I wanted the radio for, I said, 'I want to take this little radio to —' I called the man's name, I can't remember now, I

called the chauffeur's name and the Customs House Officer, said, 'This is of no value, you can give it to the little girl,' and he let me go with the radio.

"The other radio was lost over the side. That, Greene would have to explain, I don't know how that was. I lent him the radio and the radio didn't come back to me.

"Q Is it your testimony then, Mr. Parsons, that one of the radios that you loaned to a fellow crew member?

"A Greene; yes, ma'am.

"Q What's Mr. Greene's first name?

"A Leonard Greene.

"Q And the other radio you took ashore?

"A Yes, ma'am."

On cross-examination, Mr. Parsons made the following admissions:

"Q Now, you did also testify that you brought one transistor radio into Valparaiso?

"A Yes.

"Q And you didn't pay duty on that radio?

"A Didn't pay no duty on it."

Counsel for plaintiff has made much of the fact that a large amount of contraband was removed by the Chilean authorities at Antofagasta and that plaintiff was not involved in that incident. She severely criticized the laxity of the ship's officers in making searches and the generally inefficient manner in which

the whole matter of contraband was handled. The insinuation is quite pointed that many other members of the ship's crew, including Captain J. S. Lee, were much more guilty than plaintiff, and that Mr. Parsons was discriminated against. The issue is not whether Mr. Parsons was discharged for trivial reasons or without proper cause, nor whether he was discriminated against, nor whether he was entitled to further investigation and formal hearing. Much of counsel's brief in his behalf is devoted to argument of these matters. This argument is irrelevant and serves no purpose except to obscure the real issue. Apparently it was effective before the jury.

The issue is one of libel. The publication of the alleged libelous statement by mailing it to the Division of Employment Security is admitted. The first question to be answered then is whether or not it was true.

We agree with plaintiff's counsel in her statement of the law applicable to actions for libel. Words which impute crime to another (and taking contraband into a foreign country is a criminal act) are libelous per se, and proof of actual malice is not required. Martin v. Markley, 202 La. 291, 11 So. 2d 593 (1942); Edwards v. Derrick, 193 La. 331, 190 So. 571 (1939); Cotonio v. Guglielmo, 176 La. 421, 146 So. 11 (1933); Fitzpatrick v. Daily States Pub. Co., 48 La. Ann. 1116, 20 So. 173 (1896); Savoie v. Scanlan, 43 La. Ann. 967, 9 So. 916 (1891). Truth is an absolute defense, but the burden of proving truth is upon the defendant. LSA-R.S. 13:3602; Deshotel v. Thistlethwaite, 240 La. 12, 121 So.

2d 222 (1960); Madison v. Bolton, 234 La. 997, 102 So. 2d 433 (1958).

The defendant has proven by a clear preponderance of the evidence the truth of the statements made about the plaintiff in the notice of separation mailed to the Division of Employment Security. Mr. Parsons' own admissions quoted above leave no doubt of this. The finding of fact by the jury to the contrary was manifestly erroneous, and the verdict must be set aside.

Having sustained defendant's primary defense, it is not necessary to consider its secondary defense of privilege, nor the quantum of damage.

For these reasons the judgment in favor of plaintiff Hewitt R. K. Parsons against the defendant Gulf & South American Steamship Co., Inc., is reversed, and there is now judgment in favor of defendant Gulf & South American Steamship Co., Inc., against the plaintiff Hewitt R. K. Parsons, rejecting his demands and dismissing his suit at his cost in both courts.

REVERSED.

APPENDIX E

Civil District Court for the Parish of Orleans
State of Louisiana

Hewitt R. K. Parsons
vs.
Gulf & South American Steamship Company, Inc.

No. 402,724
Division "D"
Docket 4.

JUDGMENT

The rule for a new trial filed herein on April 15, 1966, by Gulf & South American Steamship Co., Inc., came on this day for hearing.

PRESENT: G. EDWARD MERRITT, attorney for plaintiff in rule.

EVANGELINE VAVRICK, attorney for defendant in rule.

When, after hearing the pleadings and argument of

counsel, and for the written reasons filed herein and made part of the record;

IT IS ORDERED that the said rule be dismissed and a new trial denied.

JUDGMENT READ, RENDERED AND SIGNED IN OPEN COURT ON MAY 6, 1966.

(Signed) S. SANFORD LEVY
JUDGE

APPENDIX F

Civil District Court for the Parish of Orleans
State of Louisiana

Hewitt R. K. Parsons
vs.
Gulf & South American Steamship Company, Inc.

No. 402,724
Division "D"
Docket 4.

REASONS FOR JUDGMENT ON RULE FOR NEW TRIAL

Plaintiff sued defendant for libel, claiming injury to plaintiff's reputation, and he asked for damages in the sum of $15,000.00.

The questions of whether or not defendant libeled plaintiff, and if so, whether plaintiff's reputation and standing in the community suffered thereby, and if so, the amount to which he would be entitled as damages from the defendant who caused such injury to plaintiff's reputation, are all questions of fact of which the Jury was the sole judge. The Jury obviously found that defendant did libel plaintiff, and did damage plaintiff's reputation because they awarded plaintiff $10,000.00 which they fixed as the amount of damages to which they felt the plaintiff was entitled.

If the Court would grant defendant's request for a

new trial this would mean that the Judge of the District Court would, in effect, be imposing its Judgment on these questions of fact rather than to accept the decision of the Jury which, as sole judges of the fact, has already rendered its decision. Hence the motion for a new trial, is, in effect, an appeal from the Jury's decision to the District Court Judge.

The Court is of the opinion that defendant's proper remedy is by appeal to the Appellate Court which has the right to determine the matter, both as to the questions of fact and the law, hence the motion for a new trial is denied.

New Orleans, La.
May 8th, 1966.

(Signed) S. SANFORD LEVY
JUDGE

APPENDIX G

Civil District Court for the Parish of Orleans
State of Louisiana

Hewitt R. K. Parsons
vs.
Gulf & South American Steamship Co., Inc.

No. 402,724
Division "D"
Docket 4.

JUDGMENT

Considering the verdict of the jury rendered herein the law and evidence being in favor of plaintiff;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff, Hewitt R. K. Parsons, and against the defendant, Gulf & South American Steamship Co., Inc., in the full sum of Ten thousand & no/100 ($10,000.00) dollars, with legal interest from date of judicial demand until paid and for all costs.

JUDGMENT READ, RENDERED AND SIGNED IN OPEN COURT ON APRIL 12, 1966.

(Signed) S. SANFORD LEVY
JUDGE

APPENDIX H

VERDICT OF THE JURY: *APRIL 12th, 1966.*

This cause came on this day for trial by jury;

PRESENT: EVANGELINE MOLERO VAVRICK, attorney for plaintiff.

G. EDWARD MERRITT, attorney for defendant.

And the following jury:
Frederick Jordy, Jr., Peter Ulysse Prevost, Emile Frederick Jordy, Henry Joseph Bauer, Robert James Hart, Milton Ernest Hayman, Herbert Ash, Ivy Louis Kern, Walter Anderson, Robert Zinn Smith, Alvin James Guillot, and John Ambroise Herbert, Foreman.

And after hearing the pleadings, evidence and argument of counsel, the case having been submitted to the jury and the charge of the Court having been delivered to them, the said jury retired to deliberate.

Thereafter, the jury returned into Court and, through their Foreman, tendered the following as their verdict.

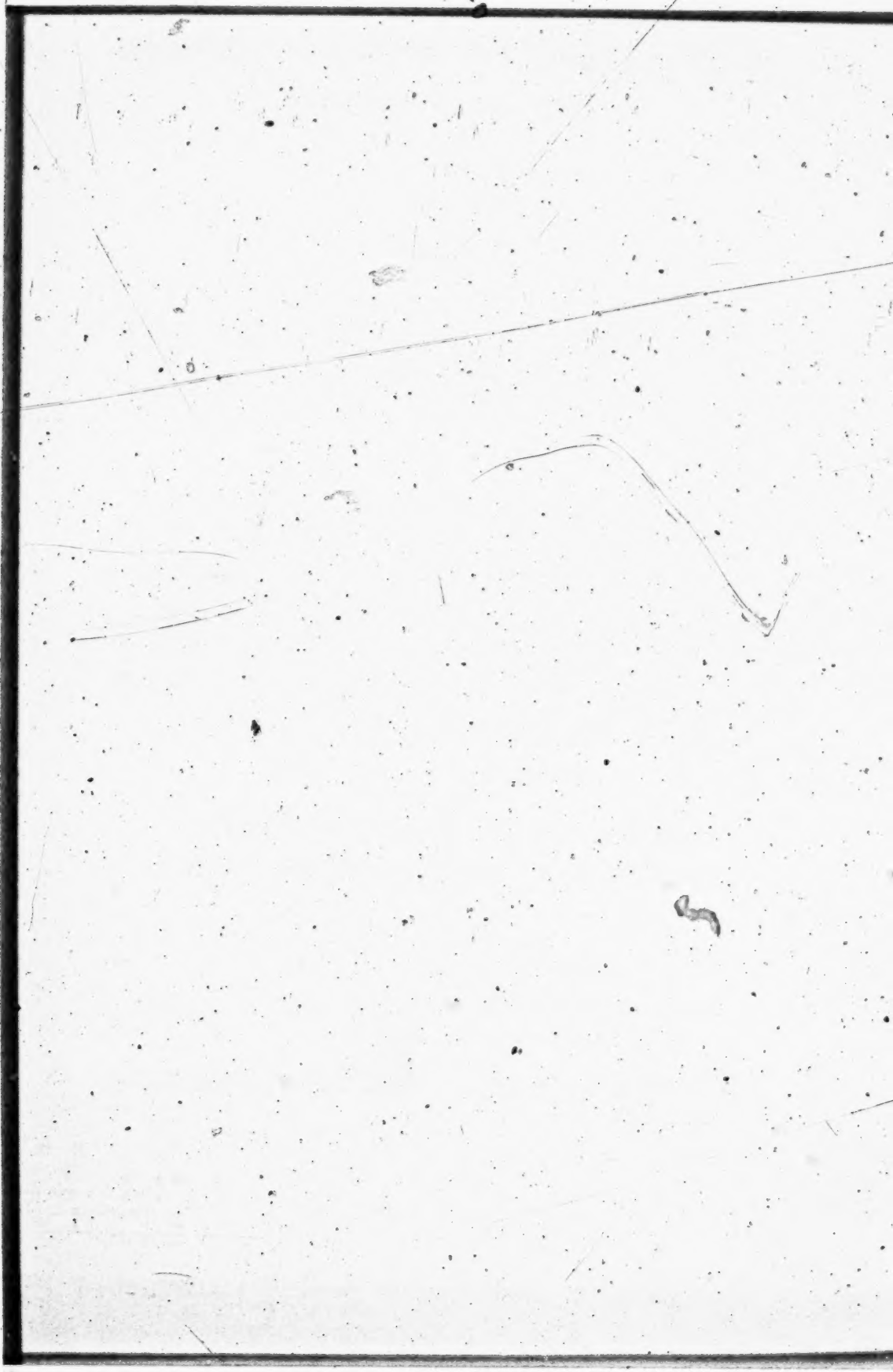
"The jury unanimously finds in favor of the plaintiff. (Sg) John Ambrose Herbert, Foreman; Judgment for plaintiff — $10,000.00; New Orleans, La. April 12, 1966, (Signed) John S. Herbert, Foreman.

And by request of counsel for defendant the said jury were polled and the verdict found to be unanimous.

"Considering the verdict of the jury rendered herein the law and evidence being in favor of plaintiff;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff, Hewitt R. K. Parsons, and against the defendant, Gulf & South American Steamship Co., Inc., in the full sum of Ten Thousand & no/100 ($10,000.00) dollars, with legal interest from date of judicial demand until paid and for all costs.

Judgment read, rendered and signed in open Court on this day."



SUPREME COURT, U. S.
Office Supreme Court, U.S.
FILED
SEP 9 1967
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 346

HEWITT R. K. PARSONS,
Petitioner,

versus

GULF & SOUTH AMERICAN STEAMSHIP CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

BENJAMIN W. YANCEY,
WILLIAM E. WRIGHT,
G. EDWARD MERRITT,
Attorneys for Respondent,
Gulf & South American Steamship Co., Inc.

TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL,
Of Counsel,
2141 International Trade Mart Bldg.,
2 Canal Street,
New Orleans, Louisiana 70130.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 346.

HEWITT R. K. PARSONS,
Petitioner,

versus

GULF & SOUTH AMERICAN STEAMSHIP CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE.

Hewitt R. K. Parsons, petitioner (hereinafter designated "Parsons"), a former employee of Gulf & South American Steamship Co., Inc., respondent (hereinafter designated "Gulf"), sued Gulf for alleged defamation of character because of statements contained in the separation notice prepared by defendant and forwarded to the Louisiana Division of Employment Security, the agency which administers the Louisiana Unemployment Compensation Statute.

The Separation Notice contained the following statement:

> "Off the SS GULF SHIPPER V-69/70 at New Orleans, La.; Dismissed Insolence to superior officers and deliberate damage to vessel property. Handling contraband which is contrary to government and to company regulations."[1]

Gulf pleaded the truth of the statement, and further that it was a privileged communication made in good faith in performance of Gulf's legal obligations.[2]

The case was tried to a jury which found for the plaintiff in the amount of $10,000.[3] The trial court refused Gulf's motion for judgment notwithstanding the verdict[4] as well as Gulf's motion for a remittitur,[5] and Gulf's motion for a new trial.[6] The Fourth Circuit Court of Appeal of the State of Louisiana reversed the award and entered judgment for the defendant on the grounds that the jury's finding was "manifestly erroneous".[7] The Court of Appeal denied plaintiff's motion for a rehearing[8] and the Louisiana Supreme Court denied Parsons' application for writ.[9]

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[1] Plaintiff's exhibit 1, R. 19.
[2] R. 11-13.
[3] Tr. 74, R. 21, 22.
[4] Tr. 74.
[5] *Ibid.*
[6] R. 25.
[7] 194 So. 2d 456 (1967).
[8] *Ibid.*
[9] *Ibid.*

ARGUMENT.

There is no constitutional question involved in this case.

This is simply a case in which the Court of Appeal properly found that there was no evidence presented which could support an award for the plaintiff. Even assuming that state jury trials are regulated by the seventh amendment to the United States constitution, an assumption which, as will be seen later, is shown to be completely erroneous by numerous decisions of this court to the contrary, the Louisiana Court of Appeal's decision is in accordance with the requirements of the seventh amendment.

The decision of the Court of Appeal in this case is identical with that of *Neely v. Martin K. Eby Construction Co., Inc.*,[10] in which the Tenth Circuit reversed a jury award for the plaintiff, as well as the trial court's refusal to enter an award non obstante verdicto, and entered judgment for the defendant on the ground that the evidence was insufficient to support the award. This Court affirmed, holding that the Court of Appeal's decision in reversing the jury's findings was in accordance with the requirements of the seventh amendment.

As pointed out in *Neely*, a U.S. Court of Appeals decision reversing a trial court's failure to grant judgment non obstante had previously been affirmed by

[10] 386 U. S. 317; *reh. den.*, 35 U.S.L.W. 3377 (Apr. 17, 1967).

this Court in *Pence v. United States.*[11] Also, in *New York, New Haven and Hartford R.R. v. Henagan,*[12] this Court directed entry of judgment for the defendant, reversing not only the trial court but the Court of Appeals.

The propriety of the Court of Appeal's reversal in the instant case is patent upon a reading of the record, and upon a recognition that in Louisiana truth is a complete and absolute defense to a libel and slander action.[13] As the Court of Appeal found, the truth of the statements made was demonstrated beyond a reasonable doubt, and the jury's finding that the statements were untrue was clearly erroneous.

The separation notice stated in part that Mr. Parsons was dismissed for insolence to superior officers and for damage to the vessel.[14] On this point, the positive testimony of second mate Scully and chief mate Cady was to the effect that Parsons was in a loud and violent mood at the time in question, kicked and broke a screen door, was ordered three times to go to his room, refused, was told he would be handcuffed, and then extended his hands in what both mates appreciated as a threatening gesture.[15] Parsons' admissions along these lines left the truth of these statements beyond doubt:[16]

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[11] 316 U. S. 332.
[12] 364 U. S. 441.
[13] *Madison v. Bolton,* 234 La. 997, 102 So. 2d 433 (1958); *Deshotel v. Thistlethwaite,* 240 La. 12, 121 So. 2d 222 (1960); L.R.S. 13:3602, La. Rev. Stat. of 1950.
[14] Cf. footnote 1.
[15] Mate Scully at Tr. 54-55; Mate Cady at Tr. 58-59.
[16] Tr. 21.

"Q. Mr. Parsons, you have testified that in Antofagasta you and fellow crewmembers were skylarking and talking loud in the passageways, is that correct?

"A. I did.

"Q. And that you kicked the door on the vessel?

"A. Yes.

"Q. And that the chief mate came up and ordered you to your room and you did not go, is that correct?

"A. Yes.

"Q. And that he ordered you again and you did not go?

"A. That's right.

"Q. And he ordered you a third time and threatened you with handcuffs and you did not go?

"A. (The witness nods his head affirmatively.)"

BY THE COURT:

"Answer the question, he can't hear you."

"A. Yes, sir."

Parsons admitted that he was "talking loud", he was also skylarking and "roughhousing" with fellow crewmembers.[17] To maintain order and discipline aboard the vessel, and to subdue skylarking and boisterous seamen, the mate's order was entirely proper, and Parsons' refusal was insubordinate.

[17] Tr. 8.

The truth of Parsons' damaging company property and disobeying a lawful order is established by the testimony of Parsons himself, and when coupled with the testimony of the two licensed officers, it was manifest error for the jury to reach any conclusion but that this statement was true.

The separation notice further stated that Parsons was handling contraband contrary to government and to company regulations.[18] Some background is in order concerning this statement in order for the court properly to appraise the situation.

Pursuant to the customs regulations of the countries which Gulf's vessels visit, a souvenir list is required to be prepared by each seaman prior to entry into each of the countries. Each member of the crew is required to declare the regulated items on a list[19] in accordance with instructions posted on the vessel's bulletin board.[20] The vessel is searched by her officers for contraband prior to the arrival at the first port of each of the foreign countries and after leaving each country. At the time of the searches, each crewmember must either have the items he declared on the souvenir list, appropriate customs receipts showing payment of duty, or customs releases evidencing no duty owing on items which the crewmember no longer has.[21]

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[18] Cf. footnote 1.
[19] Lee deposition, defendant's exhibit 1, p. 14, R. 18.
[20] *Ibid*, p. 16.
[21] *Ibid*, p. 19.

Under the customs regulations of foreign countries —as well as our own—the vessel itself is subject to fine if the customs laws are violated, as witness the fact that on this very voyage the vessel had to pay a $5,000 fine for contraband found on the vessel.[22] For this reason this company—as do all shipowners—has always maintained a very strict policy with reference to customs violations.

It was proved as a fact that the Customs Laws of the Republic of Chile provide that all radios, regardless of value, and including small transistor radios, are subject to customs duties, and that to import a radio without the paying of duty constitutes handling contraband.[23] Prior to the vessel's arrival in Chile, Mr. Parsons had declared, among other articles, on the souvenir list mentioned above, two transistor radios, five boxes of gum and seven cartons of cigarettes.[24] When the captain searched the vessel following the last port in Chile, Parsons did not have either of the two radios, the gum or the cigarettes, nor did he have a customs receipt showing payment of the duty or a release showing no duty due.

Parsons' testimony with reference to one of the radios is as follows:[25]

"Q. Now, you did also testify that you brought one transistor radio into Valpariso?

"A. Yes.

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[22] Tr. 33.
[23] Tr. 63-64.
[24] *Ibid,* exhibit 1 attached to deposition; R. 18.
[25] Tr. 26.

"Q. You didn't pay duty on that radio?
"A. Didn't pay no duty on it."

Thus by his own admission, Parsons confirmed the importation of at least one radio without paying duty, which, as shown above, constitutes handling contraband according to the laws of the Republic of Chile.[26]

Parsons' other radio allegedly fell over the side of the ship. His story here is that he loaned this radio to ablebodied seaman Greene, and that Greene did not return the radio to him.[27] Parsons testified that he did not know how the radio was lost over the side.[28] It is noteworthy that Greene testified for the plaintiff, but did not mention anything about any transistor radio loaned to him by Parsons or about its having fallen over the side.

Here, on the matter of contraband, we have the truth of the illegal importation of at least one radio into Chile admitted by Mr. Parsons, and the truth of the separation notice's reference to contraband amply proved.

From Parsons' admissions alone, it is clear, as the Court of Appeal found that the truth of the statements has been amply proved, and that for the jury to have concluded differently was manifest error which warranted reversal and entry of judgment for Gulf.

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[26] Cf. footnote 23.
[27] Tr. 12.
[28] *Ibid.*

Petitioner's application places great strength on the argument that the jury was in a better position to observe the witnesses' demeanor, and therefore to judge credibility, than the Court of Appeal. While this is an accurate statement of general principle, it simply does not apply to the situation here. A reading of the Court of Appeal's decision will disclose that the principal basis for the Court of Appeal's decision was that the admissions by the plaintiff himself established the truth of the statements in the separation notice. The essential facts supporting the veracity of the defendant's statement were all admitted by the plaintiff. This being the case, and truth being an absolute defense, there was absolutely no basis, as the Court of Appeal held, for the jury to have found for the plaintiff.

Petitioner argues that the case should be handled in the state court exactly as it would in the federal courts, wherein lies the argument that the seventh amendment should be applied to the state of Louisiana through the fourteenth amendment. But the plain hard fact of the matter is that, even though the seventh amendment were applicable to the states, the handling of this case by the state Court of Appeal was entirely consonant with the requirements of the amendment. That is clearly demonstrated by *Neely,*[29] *Pence,*[30] and *Henagan.*[31] What petitioner really tries to argue here is not only that the seventh amendment is applicable to this case, but also that

[29] Cf. footnote 10.
[30] Cf. footnote 11.
[31] Cf. footnote 12.

it requires a jury's verdict to stand even where, as in the instant case, there is no basis whatsoever upon which the jury could have found as it did.

The Court of Appeal, by virtue of its holding that the jury could not properly conclude that Gulf's statements were false, did not have to consider Gulf's additional defense of privilege. As stated, the only proof of publication of any statements by Gulf concerning Parsons consisted of the forwarding of the notice of separation to the Division of Employment Security, State of Louisiana, a communication required by law. Most jurisdictions grant complete immunity and an absolute privilege to such statements.[32] It would seem that constitutionally, there should be the protection of absolute privilege for such a statement, made under the compulsion of law, to an administrative agency which uses this information in performing its legal functions, and which is prohibited by law from communicating the information or using it for any purposes other than making its quasi-judicial decision.[33] However, since the Court of Appeal did not have to reach this point, there is no reason for a discussion of privilege at this time.

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[32] *Stafney v. Standard Oil Co.*, 71 N. D. 170, 299 N. W. 582 (1941); *White v. United Mills Co.*, 240 Mo. App. 443, 208 S. W. 2d 803 (1948); *Wagner v. Bell*, 70 Pa. D. & C. 411 (1949); Prosser, "The Law of Torts", 2nd Ed., Ch. 19, sec. 95, pp. 609-610 (West Pub. Co., 1955); Harper and James, "The Law of Torts," Vol. 1, sec. 5.25, p. 430 (Little, Brown & Co., 1956); Several states have by statute specifically granted an absolute privilege to such communications: Alabama, Florida, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Missouri, Mississippi, North Carolina, South Carolina, South Dakota, West Virginia.

[33] L.R.S. 23:1660, La. Rev. St. of 1950.

Now will respondent touch on the matter of the amount of the jury's award, except to say that, in view of the minimal amount of "publication", if any, of the statements, and in view of the fact that Louisiana law does not allow punitive damages,[34] it is easy to discern the clear and patent error of the jury in awarding the amount which it did.

What has been said up to this point has assumed the applicability of the seventh amendment jury trial requirements to state courts in civil cases. However, this court has consistently held that the seventh amendment jury trial requirements apply only to the United States courts, and that the fourteenth amendment neither guarantees a civil party a jury trial, nor does it guarantee any particular form of jury trial, if jury trial is granted by the particular state. As early as 1874, this court in *Edwards v. Elliott*,[35] enunciated the principle that while a state cannot deprive a person of property without due process of law, this does not imply that all trials in state courts must be by jury, or that the procedure need be the same as in federal court.

The *Edwards* case has been followed by a host of decisions.[36] Respondent directs the court's attention to the opinion of Chief Judge Duffy in *Olesen v. The*

[34] *Terry v. Butler*, 240 La. 398, 123 So. 2d 865 (1960); *Breaux v. Simon*, 235 La. 453, 104 So. 2d 168 (1958); *Spearman v. Toye Bros. Auto & Taxicab Co.*, 164 La. 677, 114 So. 591 (1927).

[35] 88 U. S. 532.

[36] See, for example: *Walker v. Sauvinet*, 92 U. S. 90 (2 Otto 90); *McElvaine v. Brush*, 142 U. S. 155; *Ohio v. Dollison*, 194 U. S. 445; *Maxwell v. Dow*, 176 U. S. 581; *New York Central R.R. Co. v. White*, 243 U. S. 188.

Trust Company of Chicago,[37] to the following effect:[38]

> "It is clear that there is no federal question involved in the case at bar. The seventh amendment of the United States constitution applies to trials in the United States courts. *Bute v. People of State of Illinois*, 343 U.S. 640, 657, 68 S.Ct. 763, 92 L. Ed. 986. Trial by jury in civil actions in state court may be modified by a state or abolished altogether . . . .
>
> "A denial of trial by jury in a state court is not a denial of due process of law under the fourteenth amendment. 'The fourteenth amendment neither implies that all trials must be by jury, nor guarantees any particular form of method of state procedure.' *Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v. Glidden Co.*, 284 U.S. 151, 158, 52 S. Ct. 69, 71, 76 L. Ed. 214."

The consistency of this court's refusal to apply the seventh amendment jury trial requirements to civil cases in the states continued through the October 1966 term of this Court. In three cases,[39] certiorari was denied on this precise point.

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[37] 245 F. 2d 522 (7 Cir. 1957).

[38] *Ibid*, at p. 524.

[39] *Sule v. Missouri Pacific R.R. Co.*, 181 So. 2d 280 (La. App. 1965); *writ ref.*, 248 La. 916, 182 So. 2d 664 (1966); *cert. den.*, 385 U. S. 819; *reh. den.*, 385 U. S. 983; *O'Brien v. Great Northern Ry. Co.*, 145 Mont. 13, 421 P. 2d 710 (1966); *cert. den.*, 35 U.S.L.W. 3412 (May 22, 1967); *King v. Vico Ins. Co. of St. Louis*, 182 So. 2d 135 (La. App. 1966); *writ ref.*, 249 La. 111, 185 So. 2d 220 (1966); *cert. den.*, 385 U. S. 841.

CONCLUSION.

Petitioner received a fair and impartial hearing within the requirements of the fourteenth amendment of the United States constitution. The alleged constitutional issue of whether the seventh amendment is applicable to the states through the fourteenth is moot because the exact standards required by the seventh amendment were met; and, in any event, it is well established that the seventh amendment jury requirements do not apply to state court jury proceedings.

Accordingly, there is no reason for granting a writ of certiorari in this case, and respondent submits that the writ should be denied.

Respectfully,

BENJAMIN W. YANCEY,

WILLIAM E. WRIGHT,

G. EDWARD MERRITT,
Attorneys for Respondent, Gulf & South American Steamship Co., Inc.

TERRIBERRY, RAULT, CARROLL, YANCEY & FARRELL,
Of Counsel,
2141 International Trade Mart Bldg.,
2 Canal Street,
New Orleans, Louisiana 70130.

CERTIFICATE.

I, G. Edward Merritt, a member of the bar of this Court, hereby certify that a copy of the foregoing brief has been served upon petitioner, by mailing same to petitioner's counsel of record, H. Alva Brumfield, Esquire and Mrs. Evangeline M. Vavrick, 328 Chartres Street, New Orleans, Louisiana, first-class mail, postage prepaid, at New Orleans, Louisiana, on this .... day of September, 1967.

G. EDWARD MERRITT.